69. In late February, 1997, Applicant Savoie contacted three existing facility owners or operators via letter. Those letters, referred to collectively as "Collocation Requests" are more specifically described below.

70. On February 24, 1997, Mr. Savoie contacted Chief Bill Weston of the Bellows Falls Fire Department via letter regarding the potential use of tower space on the Police/Fire Tower on Griswold Drive in Bellows Falls ("Bellows Falls Tower").

71. Also on February 24, 1997, Mr. Savoie contacted Rose Fouler of the Greater Rockingham Area Services via letter regarding the potential use of tower space on the tower at Health Care Services, Bellows Falls ("GRAS Tower").

72. On February 27, 1997, Mr. Savoie contacted Steve Stitter of the New England Power Services, Co. ("NEPS") via letter regarding the potential use of tower space on the NEPS tower on Oak Hill ("Oak Hill Tower").

73. Each of the three letters cited above contained a paragraph through which Applicant Savoie requested that any subsequent agreement be governed by an indemnification clause, a hold harmless clause, and a quiet enjoyment clause. The text of that paragraph follows:

> Consequently, if you are to agree to this proposal, I shall require an indemnification clause and a hold harmless clause in any agreement we should reach, as well as a quiet enjoyment clause. The site is worthless to me, if after I turn on the site, I am forced by the landlord to vacate from interference complaints.

74. The Bellows Falls Fire Department's radio technician reviewed Mr. Savoie's February 24, 1997 request to collocate. The Fire Department denied the collocation request, in part, because of a caution that had been identified with respect to the potential interference the FM transmitter may have caused to the existing transmission and receiving apparatus.

75. The Bellows Falls Fire Department's denial of the Applicants' collocation request was also premised, in part, on the uncertainty regarding the type and

extent of any renovation that might be required to accommodate the WLPL transmitter.

76. The Fire Department's concern over potential interference was exacerbated by the clause referred to Finding of Fact # 73.

77. The reply letter pertaining to the Bellows Falls Tower states that "the most absurd part of [Savoie's] proposal is asking the town for an indemnification and hold harmless."

78. Even if acceptable in all other respects, Applicant Savoie's insistence on the indemnification clause referred to in Finding of Fact #73 in each of the Collocation Requests rendered his offer unreasonable and predisposed the result - i.e. it solicited a denial.

79. On March 5, 1997, Steven Stitter, NEPS Senior Engineer sent a letter rejecting Mr. Savoie's request in part because they could not accept interference and "would be unwilling to assume the full risk should interference occur, as you have requested."

80. On March 26, 1997, GRAS replied to Mr. Savoie noting that they had carefully deliberated with respect to the tower request, and that they were concerned about interference and were, therefore, not interested in leasing space to Mr. Savoie.

81. Prefiled rebuttal testimony was due on March 11, 1997. None of the letters requesting tower space or rejecting the requests were submitted prior to the evidentiary hearing.

82. No evidence was submitted that documented any attempts by Applicant Savoie to follow-up on the Collocation Requests, nor had any documents been sent to existing facility owners with technical explanations regarding mitigation of impacts, offers to replace guy wires, increase tower height, etc.

83. No letters, counter-offers, or further negotiations subsequent to Applicant Savoie's receipt of the reply letters from representatives of Bellows Falls,

New England Power Services, and the Greater Rockingham Area Services denying permission to collocate were presented as evidence.

V. CONCLUSIONS OF LAW

A. Scope of Appeal

The only provision of 10 V.S.A. §6086(a) under appeal is Criterion 10. As the Board noted in the October 11, 1995 Decision denying the application, neither Athens nor Rockingham has adopted a town plan or capital program, therefore, the only facet of Criterion 10 that is presently under scrutiny is whether the proposed Project conforms with the Regional Plan. Pursuant to the Prehearing Conference Report and Order issued on January 9, 1997, the scope of the Board's review is further limited to assessing whether the proposed Project conforms with three specific policies within the Regional Plan, Policies 2, 4 and 5, each relating to the appropriate siting of communications towers. While there is some inter-relationship between the present review and that which may be conducted by the FCC, neither the FCC allocation nor the issuance of an FCC construction permit preempts the State's authority to ensure that the proposed tower meets applicable state and local land use regulations. See 47 U.S.C. §151 et seq.

B. Regional Plans as Regulatory Documents in Act 250

Act 250 is a statutory scheme intended to protect and conserve the lands and the environment of the state and to insure that these lands are devoted to uses which are not detrimental to the public welfare and interest. Findings and Declaration of Intent; Act No. 250 §1 (1969 Adj. Sess.). The applicable provisions of 24 V.S.A. §§ 4301-4495, pertaining to municipal and regional plans, are a mechanism through which the intentions of localities and defined regions of the State are entered into the calculus of determining which uses of the land are appropriate - i.e. which are in the public welfare and interest. Zoning bylaws are one means by which these intentions are given regulatory effect, adoption of a regional plan by a municipality pursuant to 24 V.S.A. § 4349 is another. In this case, the applicable policies of the Regional Plan are given regulatory effect in the Act 250 context by virtue of 10 V.S.A. §6086(a)(10). Should there be any ambiguity concerning the application of either statute to the particular set of facts presented here, the over-arching purpose of the statutory scheme regulating land use must prevail. In re Preseault, 130 Vt. 343, 346 (1972) citing Reed v. Allen, 121 Vt. 202, 207 (1959) (Statutes *in pari materia* are to be construed with reference to each other as parts of one system).

The Vermont Legislature has emphasized that the provisions of a duly adopted regional plan are not merely guidance documents or vague descriptions of regional planning goals. Rather, the Legislature at 24 V.S.A. §4348(h) specifically affirms the applicability of those provisions of a duly adopted regional plan which are relevant to the determination of any issue in proceedings under 10 V.S.A. Chapter 151 - Act 250.[2]

C. Applicable Policies

Specific language of a regional plan setting forth mandatory prohibitions is sufficient to support the denial of a permit application if the Board can not make affirmative findings under criterion 10 with respect to those provisions. See In re Green Peak Estates, 154 Vt. 363, 368-70 (1990). Thus, where a developer proposed the creation of a residential subdivision in Dorset on slopes greater than twenty percent, the Supreme Court affirmed the denial of an Act 250 permit, citing the proposed development's failure to conform to a specific policy of the Bennington County Regional Plan that prohibited residential development on slopes greater than twenty percent. Re: Green Peak Estates, Findings of Fact, Conclusions of Law and Order, Application #8B0314-2-EB, July 22, 1986, aff'd In re Green Peak Estates, 154 Vt. 363 (1990); see also In re MBL Associates, Docket No. 96-110, Entry Order, March 6, 1997; but Cf. In re Frank A. Molgano, Jr., 163 Vt. 25 (1994) (where the regional plan is ambiguous rather than specific).

The relevant policies of the Regional Plan, all of which pertain to the proper siting of communications facilities, follow:

2. Encourage expansion of communications at existing transmission and receiving stations if such expansion is in the best public interest.

4. Discourage the development of new sites for transmission and receiving stations in favor of utilizing existing facilities.

2

In a letter of opinion written in 1970, the Attorney General indicated that, insofar as Act 250 is concerned, regional plans . . . "have achieved the role and status of law in and of themselves, something far beyond their intended purpose under 24 V.S.A. Chapter 91 [now Chapter 117]." The Attorney General made it clear that the above statement was not intended as a formal legal opinion; nonetheless, it is an instructive insight. Atty. Gen. Op. No. 609, p. 162 (1970) (emphasis in original) cited in Re: Pyramid Company of Burlington, Application #4C0281, Findings of Fact, Conclusions of Law and Order, October 12, 1978.

5. Strongly encourage the siting and design of satellite dishes, radio towers, antennae and other transmission and receiving equipment to minimize negative impacts on natural and scenic resources.

The Applicants have argued and the Board has concluded that each of the above three policies constitutes a specific policy. See Re: Gary Savoie, d/b/a WLPL and Eleanor Bemis, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order (Oct. 11, 1995). Having made this determination, the Board can confidently embark on an analysis of whether the proposed Project conforms with each of these policies. Where the policies of a regional plan are specific by their own terms and without reference to any other document or regional plan provision, they are to be given the effect intended and should be evaluated in view of the document's overall purpose. See In re Judy Ann's Inc. d/b/a The Loco-Motion, 143 Vt. 228 at 231(1983); In re Village of Waterbury Water Commissioners, Declaratory Ruling # 227 at 12 (February 5, 1991).

Broadly stated, the purpose of the applicable provisions of the Regional Plan is to mitigate, or if possible eliminate, the negative visual impacts caused by certain telecommunications facilities. Such facilities, when they protrude above the ridgeline, are not only visible but incongruous with the scenic qualities associated with Vermont's mountain ridges. This Board has continually noted the importance of protecting the visual continuity of Vermont's prominent mountaintop ridgelines. See Re: Quechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (Jan. 13, 1986).

D. Burden of Proof

Pursuant to 10 V.S.A. §6088(a) the Applicants generally have the burden of proof under Criterion 10. In the context of this appeal of the Reconsideration Decision, the general rule remains binding upon the Applicants, subject to one modification. In this instance, as noted in the discussion *supra* at page 4, the Board extends a presumption of validity regarding the District Commission's findings with respect to Policy 5 of the Regional Plan. Re: Sherman Hollow, Inc. et al., Application #4C0422-5R-1-EB, Findings of Fact, Conclusions of Law, and Order (Revised) at 18 (June 19, 1992).

The Board in its Decision denying the Applicants' permit request, found that the Applicants had met their burden with respect to Criterion 8, finding that the Project, as

proposed, would not result in an undue adverse impact upon scenic values, and that it would not have an undue adverse effect upon unique natural areas or necessary wildlife habitat. Given the similarity between the Board's Criterion 8 standard and the Regional Plan's Policy 5 standard, the Board extended its reasoning and its conclusions to find that the Project, as proposed on the Bemis Hill site, would comply with Policy 5.

Applicants argued at the prehearing conference that on the basis of the Board's, and subsequently the Commission's, findings with respect to Policy 5, conformance therewith need not be determined again. However, because of the relationship between Policies 2 and 4 and Policy 5, and because in the event that reasonable alternative sites were identified, a *relative* analysis of the proposed Project's impacts upon scenic values might be necessary, the Board nevertheless determined in its Prehearing Order that Policy 5 was still appropriately within the Board's scope of review. Even though Policy 5 is still within the scope of review, the Applicants are entitled to a presumption of validity relative to Policy 5. Therefore, Appellants have the burden of demonstrating non-conformance with Policy 5 by a preponderance of the evidence.

In the Decision, the Board concluded from an objective standpoint, and without reference to alternative sites, that the proposed tower would not constitute an undue adverse effect on aesthetics. In this case, if the Applicants were to have proven by a preponderance of the evidence that the Bemis Hill location was the only site within the Area to Locate from which an FM signal could be transmitted to Walpole, New Hampshire, then the Board would rely on its presumption of validity to affirm its conclusions under Policy 5. Moreover, because such a result would mean that there were *no* feasible alternative sites, Appellants could not demonstrate a less aesthetically-intrusive alternative. Likewise, assuming alternatives were identified after a search manifesting all due diligence, if the Applicants proved by a preponderance of the evidence that the owners or operators of all technically feasible existing facilities within the Area to Locate had denied the Applicant permission to collocate *after a good faith negotiation with each owner or operator*, then Applicants would satisfy Policies 2 and 4. Under this scenario, Appellants would again be hard-pressed to argue the practicability of a less intrusive alternative. Instead, based upon the Board's Decision and the presumption of validity with respect to Policy 5, the Board's prior conclusions regarding impacts to scenic resources would remain intact since the Board would not be able to weigh the relative visual impact of one site versus another because Applicants would have proven that no other alternative sites were available for collocation.

E. Compliance with Criterion 10 (Regional Plan)

Provisions of a Regional Plan, like zoning ordinances, should be construed according to the ordinary rules of statutory construction. In re MBL Associates, Docket No. 96-110, , Entry Order, March 6, 1997 at page 2 citing Houston v. Town of Waitsfield, 162 Vt. 476 (1994). The fundamental rule in the construction of statutes is to give effect to the intention of the legislature. Verrill v. Daley, 126 Vt. 441, 446 (1967); Reed v. Allen, 121 Vt. 202, 206 (1959). In this case, there can be no reasonable dispute over the clarity or ambiguity of the express language of the Regional Plan. The Regional Plan clearly sets forth a preference for the use of existing facilities in order to avoid constructing new ones. Thus, the Board need not embark on a lengthy analysis of the proper construction of the text of the Regional Plan.

The Board concludes that the collocation provisions of the Regional Plan furthered by Policies 2 and 4 are intended as mandatory requirements. Moreover, the unequivocal language of those Policies is not only clear on its face, but the principle of physical collocation that it embraces favors a strong public policy of maintaining the integrity of Vermont's scenic resources - specifically its mountaintops and contiguous ridgelines. To hold otherwise would render the collocation provision pure surplusage and would not further the broad goals of minimizing the negative impacts of commercial development that are the clear intent of Vermont's land use regulatory scheme. Trombley v. Bellows Falls Union High School, 160 Vt. 101, 104 (1993) quoting State v. Beattie, 157 Vt. 162, 165 (1991) (statutory provision not to be construed in a way that renders a significant part of it pure surplusage). Were collocation a matter that the Regional Planning Commission merely suggested, this Board's intrusion into the province of a commercial operators' business negotiations to effect collocation might overstep the bounds of the legislature's intent as expressed in 24 V.S.A. §4348(h). However, such is not the case here since Policies 2 and 4 are specific, mandatory requirements.

Before analyzing compliance with each of the three specific policies at issue, the Board must first consider the general principle espoused by Policies 2, 4 and 5 of the Regional Plan: one that is known as collocation.

Collocation

The principle of collocation is employed with respect to communications facilities in two inter-related, but distinct, contexts[3]. In this case, the Windham Regional Planning Commission has contemplated the need to minimize the number of telecommunications towers necessary to transmit legally authorized signals, whether those be FM or AM radio transmission, cellular telephone service, cable television, emergency broadcast signals or the like. It promotes this goal through Policy 4 of the Regional Plan which requires, where possible, physical collocation of transmission facilities. In the context of an Act 250 proceeding, this requirement imposes a burden upon an applicant to demonstrate to the district commission or to the Board, that there are no existing sites which are suitable to the applicants needs, and that if such facilities do exist, that they are either technically inadequate (even with significant modifications) or that the owner - after the process of a meaningful, good faith negotiation, conducted at arms' length - will not allow collocation.

While the widely-favored public policy goals of collocation are obvious, the more troublesome issue, from the standpoint of a regulatory Board, is analyzing, and in the end determining, the amount of zeal with which the operator of a private commercial enterprise who seeks to construct a new tower must affirmatively negotiate with the owner or operator of an existing communications facility to collocate on the existing tower. The issue is particularly problematic where, as in this instance, the Applicants could potentially recover a substantial economic benefit, independent of the operation of the FM transmission facility, if they are *unsuccessful* in collocating on an existing facility.[4]

---

[3] One use of the collocation principal, not relevant in the instant case, relates to the sharing of "virtual space" necessary to transmit a multitude of signals through a single cable, or over a single frequency. The FCC and certain states have required telephone companies to lease space inside (or alternatively provide interconnection facilities just outside) their local switching offices to accommodate the placement of competitors' telecommunications equipment. *See for example*, Larsen, Alexander C. and Mudd, Douglas R. "Collocation and Telecommunications Policy: A Fostering of Competition on the Merits?" in 28 Cal. W. L. Rev. 263-313 (1992). The objective of such a policy is not to provide aesthetic enhancements or prudent land use management; rather, it is a mechanism to spur competition amongst the various telecommunications providers. Arguably, absent the imposition of a legally binding collocation requirement, or effective market-based incentives to favor collocation, the owner and operator of the physical cable or transmission line, would enjoy a natural monopoly, thereby excluding competition and preserving the potential to gouge ratepayers.

[4] The additional economic benefit that can reasonably be foreseen is that benefit which would accrue to a new tower operator as a "tower landlord." This underscores the economically rational "avoidance" of collocating, since the privilege of construction, once bestowed, also ensures that all future applicants must seek to locate on the then-existing tower.

After an exhaustive search for guiding precedent, the Board has been unable to find an analogous framework for effectively implementing a collocation policy. The following discussion, therefore, provides background for the Board's enunciation of a standard relating to the implementation of a specifically articulated collocation policy such as the one set forth in Policies 2 and 4. The Board concludes that in order to carry out the intent of both 24 V.S.A. §4348(h) and the collocation provision of the Regional Plan, and to ensure compliance with Criterion 10 of Act 250, the Board must probe into the negotiations between the Applicants and each of the existing tower owners within the Area to Locate.

Because the effectiveness of the collocation policy is, in part, contingent upon the granting of permission by existing facility owners and operators to "newcomers" to a particular market, the collocation provision of Policies 2 and 4 is one that implicates not only the rights and obligations of the permit applicant, but also the tower operators who, in this instance, manage the "existing facilities" within the Area to Locate. These individuals enjoy certain property rights in their communications facilities that are potentially affected by their allowing collocation to occur.[5]

5

Property rights in the context of telecommunications facilities have been determined by the U.S. Supreme Court to consist of three rights associated with the ownership of property: the power to possess, the power to use, and the power to dispose. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982). Loretto involved a New York law that required a landlord to permit a cable company to install cable equipment on his building. The U.S. Supreme Court discussed the implications of such a requirement on each of the rights associated with the landlord's ownership of the building. Although the following discussion pertains to the constitutional issue of a taking, a matter beyond the jurisdiction of the Board and not relevant to this case, the discussion provides a meaningful context for determining the relatively slight regulatory burden imposed upon both tower facility landlords and those asked to collocate on their existing structures in the Regional Plan policies under scrutiny.

If government action constitutes a permanent physical occupation of property, there is a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Loretto at 434-35. In determining whether the New York law at issue in Loretto constituted a physical taking, the Court analyzed the following issues: (1) whether the government authorized action deprived the owner of both his right to possess the occupied area and his right to exclude the occupier from possession and use of it; (2) whether the government action forever denied the owner any power to control the use of the property such that he can make no non-possessory use of it; and (3) whether the government action generally leaves the owner with only "the bare legal right to dispose of the occupied space." Southview Associates, Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992) discussing Loretto. The Loretto Court went on to add that *absolute* exclusivity of the occupation, and *absolute* deprivation of the owner's right to use and exclude others from the property were hallmarks of a physical taking. The Southview case strongly validates the Board's authority to engage in regulatory review that protects aesthetic values as well as such unique and irreplaceable resources as wildlife habitat and recreational opportunities derived from the preservation of the landscape. The rationale of the Second Circuit Court of Appeals supports such

Policies 2 and 4 of the Regional Plan

In the present case, the Windham Regional Plan's collocation principle, as espoused in Policies 2 and 4 only slightly impinges upon the property rights of existing facility owners, if at all. Indeed, because Policy 4 discourages creation of new communications sites, it creates a potential source of revenue to existing tower owners. The operator of an existing facility is not compelled to allow any operator to collocate upon the existing facility. Within the considerably broad parameters of technical feasibility, existing facility operators are encouraged to expand their facilities to accommodate new proposed transmission and receiving facilities. As noted above, Policies 2 and 4 do not compel owners and operators of existing facilities to lease to new licensees. Rather, by applying to new applicants such as Applicant Savoie, Policies 2 and 4 stimulate market transactions that will promote efficient use of telecommunications resources and at the same time minimize the impacts of new telecommunications structures upon the sensitive aesthetic values associated with mountain ridges. We conclude that the collocation requirements of the Regional Plan are specific and mandatory policies furthering broad public policy goals that seek to balance the benefits of a more sophisticated telecommunications infrastructure with the need to preserve the aesthetic and recreational values of the region. Both are essential to the growth of the State's economy. The Board concludes that Policies 2 and 4 impose affirmative obligations upon an applicant for a new telecommunications facility.

Public Policy Rationales for Telecommunication Facility Collocation

Collocation if executed properly will greatly mitigate the environmental impacts associated with the rapidly developing sector of the economy involving telecommunications, wireless services, and broadcasting. The Board acknowledges that the benefits of a highly developed communications infrastructure are essential to economic growth within the state. The Board concludes, however, that given the Applicants' almost singular focus on the Bemis Hill site, they have not paid adequate regard to the Regional Plan's admonition

---

regulations even where the statutory scheme under scrutiny tends to impose affirmative obligations upon an applicant.

In a similar case involving a challenge to the Pole Attachments Act, 47 U.S.C. §224 (1988) (authorizing FCC to regulate rates utility companies can charge cable television operators who lease utility company poles to carry their television cables) the U.S. Supreme Court affirmed the narrow scope of physical takings review, holding that where the utility invited the cable company to lease space on its poles there had been no physical taking, even where the effect of the FCC regulation was a substantial reduction in rent received by lessor. FCC v. Florida Power Corp., 480 U.S. 245 (1987).

discouraging the development of new sites for transmission and receiving stations in favor of utilizing existing facilities. Leaving aside the question of whether Bemis Hill is a technically feasible site for the transmission of an FM station to Walpole, New Hampshire, the Board concludes that the Applicants have not fulfilled their obligation to explore opportunities to locate the FM transmitter on an existing facility.

The Test for Compliance

No court or administrative agency within Vermont has yet interpreted the requirements imposed by a telecommunications collocation policy. As a touchstone for its determination of compliance with Policies 2 and 4 of the Regional Plan, the Board will use a two-part test. First, the Board will determine whether the Applicants exercised due diligence in seeking to identify existing towers within the Area to Locate that could be pursued as reasonable alternatives. Next, assuming that any additional site is identified, and guided by several principles of the law of commercial transactions, the Board will determine whether the Applicants' attempt at collocation was conducted in good faith, as an arms-length transaction.

The Search For Existing Facilities Must be Made with Due Diligence

The discharge of Applicants' burden to locate on an existing facility must follow a search that is conducted with all due diligence to ascertain any available alternatives. The Board is not compelling the Applicants to construct the proposed FM transmission facility at a site other than Bemis Hill. Indeed, the Board acknowledges that it has no authority to do so under Policies 2 and 4. Rather, the Board is requiring that all available alternatives to the Bemis Hill location be meaningfully explored. The first step in that process is to identify all existing facilities. In this case, Applicant Savoie conducted what he claims to have been an exhaustive physical search of the region. In the prior proceedings, only the Mount Kilburn site was identified as a possible alternative. In order to determine whether there were any other such alternatives, Applicant Savoie took the following actions: he drove many miles of back roads, he posted listings at general stores, he searched property records in town clerks' offices, and explored abandoned or infrequently-used utility line infrastructure. Applicant Savoie claims to have conducted roughly 200 hours worth of such searching. In addition, Applicant Savoie searched a federal database known as Dataworld. This database lists only those towers which exceed 200 feet in height and, therefore, any potential alternatives that may have appeared in this database would be obvious from even the most cursory physical inventory of the region.

Applicant Savoie identified no alternative sites in his prefiled testimony except Mount Kilburn. The number of hours one spends in pursuit of a desired goal is not necessarily a manifestation of due diligence. Rather, due diligence is determined by a look at the totality of circumstances. Applicant Savoie failed to use an FCC database that listed all FCC licensees within the region. Instead, he used the Dataworld database that he should reasonably have known would not generate the names and locations of any facilities with which he was not already familiar. In contrast, Appellants' search was a very narrow search of a more recent FCC database than Dataworld that is publicly accessible on the Internet. This more comprehensive FCC database turned up a number of sites within the Area to Locate. Searching this database enabled the Appellants to identified the three additional potential alternatives that were noted in the table set forth in Finding of Fact #34 ("the Alternatives").

Once existing facilities are identified, the next step toward finding reasonable alternatives is to perform at least a minimal analysis of technical feasibility. Appellants presented substantial evidence tending to show that any one of the Alternatives which they specifically analyzed could be modified to accommodate Applicants proposed transmission facility, and showed that, in sum, each site was a reasonable alternative to the Bemis Hill site. Appellants submitted their findings to the Board as prefiled direct testimony, and it was only by virtue of providing that testimony to Applicants that the Applicants then commenced negotiations with the owners and operators of the Alternatives.

The Board concludes that the Applicants did not exercise reasonable due diligence in their search for available alternatives to the Bemis Hill site. On this basis alone, the Board declines to find conformance with Criterion 10. However, because the Appellants have prompted the Applicants to explore three additional alternatives, the Board next turns to an analysis of the Applicants' attempt to collocate on each of those existing facilities.

Negotiating in Good Faith

Once all technically feasible alternatives are ascertained (in this case, largely with the assistance of the Appellants), a project applicant that is bound by the collocation provisions of the Regional Plan must conduct good faith negotiations with the owner or operator of each and every existing facility to collocate on one of those existing facilities. Only after both a search manifesting all due diligence to ascertain available alternative sites, and a good faith negotiation with the singular objective of successful collocation, will the Applicants have satisfied the burden that is assigned to them under Policies 2 and 4 of the Regional Plan.

The Applicants may not simply telegraph their desire to be unsuccessful in the negotiation. Rather, an applicant must aim to succeed in the negotiation to secure tower space.

Co-Applicant Savoie is a successful entrepreneur and businessperson and he has testified to his significant expertise in the field of telecommunications. The Board need not instruct such an Applicant regarding the particular manner in which a businessperson diligently pursues a contract negotiation. Applicants need not be reminded of the elements of a good faith attempt to locate WLPL's proposed transmission facility on any one of a number of sites within the Area to Locate that the Board concludes could be made technically capable of housing the WLPL FM transmitter.

The Applicants commenced their negotiations with each of the Alternatives, except the Mount Kilburn site, very late in the course of the appeal proceeding. Specifically, between the period after Applicants received the Appellants direct testimony, and the date of the hearing - a period of roughly two and one-half months. The circumstances attendant to the limited negotiations between Applicant Savoie and each of the existing facility owners and operators that were identified by the Appellants were clouded by a request that any contract between them include an indemnification and hold harmless clause. Vermont law permits such an indemnification clause in the context of a landlord-tenant relationship. See for example, Lamoille Grain Company, Inc. v. St. Johnsbury and Lamoille County Railroad, 135 Vt. 5 (1976); Washington Electric Co-op, Inc. v. Massachusetts Mun. Wholesale Electric Co., 894 F.Supp 777 (Dist.Vt. 1995). However, it is typically the landlord who seeks indemnity from a tenant owing to the landlord's superior property rights in the ownership of the leasehold and because it is typically the tenant, not the landlord, who has the greater control over the activities on the premises from which liability might arise. The reason for such a clause, from a commercial landlord's perspective, is to enable the landlord as owner of the property hosting other business enterprises, to protect his or her own interests in the following ways: (1) it exonerates the landlord from liability which might arise as a consequence of any tenant's tortious conduct; (2) it shields the landlord from paying damages that are ordered as a result of an actionable nuisance claim against one of the landlord's tenants by another; and (3) with respect to insurance coverage, where an insurance company defends on a claim for loss, and where a cause of the harm for which coverage is claimed extends from the actions of any tenant, such insurance company may attempt to implicate the assets of the landlord through a device such as impleader or interpleader. An indemnification clause in favor of the landlord as indemnitee can insulate the landlord from having to contribute to the payment of the claim for coverage.

In this case, a properly executed indemnification clause naming Mr. Savoie as indemnitee would shift any potential liability arising from Applicant Savoie's FM

transmission apparatus to the tower owner. On the basis of the documentation provided by the Applicants, Applicant Savoie has not provided any assurance to the recipients of the Collocation Requests that he would attempt to provide technical explanations regarding mitigation of impacts attributable to the WLPL transmission equipment. In effect, the tower landlord would become Applicant Savoie's silent business partner without corresponding compensation. See City of Burlington v. National Union Fire Insurance Co., 163 Vt. 124 (1994) citing Toombs NJ Inc. v. Aetna Casualty and Surety Co., 591 A.2d 304, 306 (Pa. Super. Ct. 1991). It is unreasonable to expect that an existing tower owner would concede to the indemnification clause based on the paucity of data regarding how Applicant Savoie could make his proposed transmission facility fit within the operating parameters of the existing transmission and receiving apparatus.

An agreement to the indemnification clause in the Collocation Requests by any of the owners or operators of the existing facilities that were identified would have amounted to a voluntary expansion of their own potential liability. Such an agreement in this case would needlessly impose great risk in the economic venture upon an existing facility owner without any prospects of sharing in the economic benefits which may accrue to Applicant Savoie's FM station. While an indemnification request as a component of an initial request to collocate may have been reasonable as an aggressive starting point for the negotiations, Applicant Savoie's decision not to follow up on the denial of the Collocation Requests support the Board's conclusion that these were "take it or leave it" offers that required the inclusion of an indemnification agreement naming Applicant Savoie as indemnitee and holding his operations harmless. Applicant Savoie's insistence upon the indemnification and hold harmless clauses, without significant financial enticement, predisposed the result of having his Collocation Request refused in each instance. Applicant Savoie compounded an unreasonable request for indemnification with a cursory, or at best, an incomplete description of the technical feasibility of collocating his equipment within the operating parameters of the existing transmission and receiving apparatus. The fact that Applicant Savoie was the one requesting to locate on the tower, and not vice-versa, renders the request to be held harmless even more unreasonable.

The tenor of Applicant Savoie's letters preordained the result of having his request denied in each instance. Applicant Savoie did not even attempt to identify any benefits, including economic benefits of leasing tower space to his station, he alluded to a tower that has been notoriously causing interference in the Town of Charlotte, he referred to a pending lawsuit against an FM transmission facility in White River Junction, he sought, unreasonably, indemnification from the tower owner, and he did not participate in any give-and-take that is typically associated with the negotiation of a contract between a vendor of commercial space and a potential tenant. Accordingly, the Board concludes that the Applicants failed to negotiate in good faith.

As explained above, the Board concludes that the Windham Regional Planning Commission made it abundantly clear, through the express language of the Regional Plan, that it sought to minimize the number of telecommunications towers within the region. It sought to do so not only by promoting the use of existing telecommunications facilities, but it also set forth a policy to *encourage the expansion* of these existing facilities. Moreover, the Regional Plan makes it clear that where towers are to be sited, they should be constructed with as little impact to valuable scenic resources as possible.

Without fulfilling their obligations to identify and assess all existing facilities and to negotiate in good faith with the owners of each of those facilities that were identified by the Appellants, the Applicants have undercut the meaning of the Regional Plan and have failed to demonstrate compliance with Criterion 10. Because the Board concludes that the Applicants have not met their burden of proving compliance with Criterion 10, it declines to reach the issue of whether the Appellants have met their burden with respect to Policy 5.

VI. ORDER

1. Application #2W0991-EB (Reconsideration) is hereby denied.

2. Land Use Permit #2W0991 (Reconsideration) is void.

Dated at Montpelier on this 27th day of August, 1997.

ENVIRONMENTAL BOARD

John T. Ewing, Chair
Arthur Gibb
Robert G. Page, M.D.
William Martinez
Marcy Harding
Robert Opel
Rebecca Day

EXHIBIT K

State of Vermont

LAND USE PERMIT

AMENDMENT

CASE	#7C0467-5	LAWS/REGULATIONS INVOLVED
APPLICANTS	Atlantic Cellular Co., L.P. 15 Westminster Street Suite 830 Providence, RI 02903 and Vermont ETV, Inc. 88 Ethan Allen Avenue Colchester, VT 05446 and State of Vermont Department of Forests, Parks and Recreation 103 South Main Street Waterbury, VT 05676	10 V.S.A., Chapter 151 (Act 250)

District Environmental Commission #7 hereby issues Land Use Permit Amendment #7C0467-5 pursuant to the authority vested in it in 10 V.S.A., Chapter 151. This permit amendment applies to the lands identified in Book 19C, Page 22 and Book 194, Page 361 of the land records of Burke, Vermont, as the subject of a deed to State of Vermont (Darling State Forest with a lease agreement with Atlantic Cellular Company, L.P.), the "permittees as grantees". This permit amendment specifically authorizes the permittees to add one, eight foot diameter, microwave dish (at the 55 foot tower elevation) to the proposed 60 foot communications tower, eight, fourteen foot, whip antennae (at the 60 foot tower elevation) to an existing 75 foot communications tower, and the installation of communications equipment in an approved addition to the existing Vermont ETV, Inc. equipment shelter. The tower and shelter are within the existing Burke Mountain Electronic Communications Facility located on top of Burke Mountain in the Town of Burke, Vermont.

The permittees, their assigns and successors in interest, are obligated by this permit amendment to complete and maintain the project only as approved by the District Commission in accordance with the following conditions:

1. Except as specifically amended herein, all terms and conditions of Land Use Permit #7C0467 and subsequent amendments remain in full force and effect.

2. The project shall be completed, maintained, and operated as set forth in the Findings of Fact and Conclusions of Law #7C0467-5, in accordance with the plans and exhibits on file with the District Environmental Commission, and in accordance with the conditions of this permit. No changes shall be made in the project without the written approval of the District Environmental Commission.

3. By acceptance of the conditions of this permit without appeal, the permittees confirm and agree for themselves and all assigns and successors in interest that the conditions of this permit shall run with the land and the land uses herein permitted, and will be binding upon and enforceable against the permittees and all assigns and successors in interest.

4. The District Commission maintains continuing jurisdiction during the lifetime of the permit and may periodically require that the permit holder file an affidavit certifying that the project is being completed in accordance with the terms of the permit.

5. By acceptance of this permit the permittees agree to allow representatives of the State of Vermont access to the property covered by the permit, at reasonable times, for the purpose of ascertaining compliance with Vermont environmental and health statutes and regulations and with this permit.

6. The project as approved allows for the installation of telecommunications equipment at the Burke Mountain Communications Facility consisting of one, eight foot diameter, microwave dish (at the 55 foot tower elevation) to the proposed 60 foot communications tower and eight, fourteen foot, whip antennae (at the 60 foot tower elevation) to an existing 75 foot communications tower. No additional microwave dishes, height extensions, additional antennas, or additional equipment shall be installed on the towers at this facility prior to review and approval by the District Coordinator or the District Commission under applicable Environmental Board Rules.

7. The microwave dish cover shall be of a color to blend in with the existing tower infrastructure.

8. Vermont ETV, Inc. and the State of Vermont Department of Forests, Parks and Recreation shall submit a proposed approach and outline for a communications site Master Plan to the District 7 Commission no later than July 31, 1995.

9. The District Environmental Commission reserves the right to evaluate and impose reasonable additional conditions necessary to ensure no undue adverse impact with respect to Criteria 1, Air Pollution, as it relates to radio frequency radiation. The Commission reserves this right for a period of time commencing and expiring with the permit.

10. Construction activities are allowed between April 15 and September 15 only, in any given year.

11. Each prospective purchaser of this tract shall be shown a copy of the approved plot plan, and the Land Use Permit before any written contract of sale is entered into.

12. Notwithstanding any other provision herein, this permit shall expire three years from the date of issuance if the permittees have not commenced substantial construction in accordance with 10 V.S.A. § 6091(b) (amended June 21, 1994).

13. Pursuant to 10 V.S.A. § 6090(b) (effective June 21, 1994), this permit amendment is hereby issued for an indefinite term, as long as there is compliance with the conditions herein.

Dated at St. Johnsbury, Vermont, this 19th day of June, 1995.

BY Edward Newell

Edward Newell, Chairperson
District Environmental
Commission #7

Other members participating in this decision:

Jill Broderick

Michele Boomhower

Michele Boomhower
Assistant District Coordinator

(C:\WP51\FILES\7C0467-5.ALUP)

STATE OF VERMONT
DISTRICT ENVIRONMENTAL COMMISSION #7

RE: Atlantic Cellular Co., L.P. 15 Westminster St. Suite 830 Providence RI 02903 and Vermont ETV, Inc. 88 Ethan Allen Avenue Colchester, VT 05446 and State of Vermont Dept. of Forest, Parks, and Recreation 103 South Main Street Waterbury, VT 05676	) Application #7C0467-5) Findings of Fact and) Conclusions of Law) 10 V.S.A., Chapter 151) (Act 250)

INTRODUCTION TO THE FINDINGS OF FACT:

On May 8, 1995, an application for an Act 250 Permit was filed by Atlantic Cellular Co., L.P., Vermont ETV, Inc., and State of Vermont Dept. of Forest, Parks, and Recreation for a project generally described as the installation of telecommunications equipment at the Burke Mountain Communications Facility consisting of one, eight foot diameter, microwave dish (at the 55 foot tower elevation) to the proposed 60 foot communications tower, eight, fourteen foot, whip antennae (at the 60 foot tower elevation) to an existing 75 foot communications tower, and the installation of communications equipment in an approved addition to the existing Vermont ETV, Inc. equipment shelter. The project is located atop Burke Mountain in the Town of Burke, Vermont.

The tract of land consists of 1,179 acres with 0.5 acres involved in the project area. The applicant's legal interests are ownership in fee simple.

Under Act 250, projects are reviewed based on the ten criteria of 10 V.S.A., Section 6086(a)1-10. Before granting a permit, the Board or District Commission must find that the project complies with these criteria and is not detrimental to the public health, safety or general welfare.

Decisions must be stated in the form of Findings of Fact and Conclusions of Law. The facts we have relied upon are contained in the documents on file identified as Exhibits 1 through 21 and the evidence received at a site visit and a hearing held on May 24, 1995.

Parties to this application are:

(A) The Applicants by Richard Craig, Elizabeth Kohler, Esq., and Sally Greene.

(B) The Municipality of Burke.

(C) The Northern Vermont Development Association.

(D) The Agency of Natural Resources.

FINDINGS OF FACT:

Prior to taking evidence with regard to the ten Criteria of 10 V.S.A., Section 6086(a), all parties agreed that the applicant through submission of the application material has met the burden of proof with respect to:

1A	Headwaters	9A	Impact of Growth
1B	Waste Disposal	9B&C	Agricultural Soils
1C	Water Conservation	9D&E	Earth Resources
1D	Floodways	9F	Energy Conservation
1E	Streams	9G	Private Utilities
1F	Shorelines	9H	Cost of Scattered Development
1G	Wetlands		
2&3	Water Supplies	9J	Public Utilities
4	Soil Erosion	9K	Public Investment
5	Transportation	9L	Rural Growth Area
6	Educational Services	10	Conformance with Local and Regional Plans
7	Municipal Services		
8A	Wildlife Habitat and Endangered Species		

Parties, therefore, waived the issuance of written findings concerning these criteria as the application shall serve as Findings of Fact.

Jurisdiction over this application is conferred by 10 V.S.A., Chapter 151 because the project is a commercial project involving more than ten acres.

The following written Findings of Fact are limited to Criteria:

1	Air Pollution
8	Aesthetics, Scenic Beauty, Historic Sites, and Natural Areas

In making the following findings, we have summarized the statutory language of the 10 Criteria of 10 V.S.A., Section 6086(a):

SECTION 6086(a)(1) AIR POLLUTION:

The Commission finds that this project will not result in undue air pollution.

1. Radio Frequency Radiation (RFR) emissions are recognized by the Communications Industry to be a potential health risk as indicated by the Federal Communications Commission's (FCC) licensing standards and adherence to the American National Standards Institutes (ANSI) guidelines with regard to RFR emissions. Testimony.

2. According to, Final Report: Survey, Investigation & Analysis of Communications Facilities on 3 Vermont Owned Mountaintops, Vermont Agency of Natural Resources, Department of Forests, Parks, and Recreation prepared by Raymond C. Trott, the Burke Mountain Communications Facility has a potential problem with the level of RFR emissions in specified locations, as measured by the ANSI/EEE C95.1-1992 standards, which are utilized in the FCC licensing process. The study indicates that one of the areas which exceeds the established standard is located immediately outside of the State of Vermont fire tower platform. Testimony.

3. The fire tower and platform are open to the public for recreational purposes. Testimony.

4. The installation of Atlantic Cellular's communications equipment will amount to a small, but contributory, increase in the level of RFR emissions, generated through an increase in transmitter power, at the Facility (ie. the Vermont ETV television transmitter emits 25,000 watts of transmitter power, the Atlantic Cellular equipment will produce an additional 80 watts of transmitter power). Testimony.

Discussion:

The Commission has relied upon the testimony given and the material submitted regarding the issue of RFR emissions at the Burke Mountain Facility. The Commission is primarily concerned with the compatibility of the current mixed use of the Facility as a communications site and a public recreation site, as these two activities relate to the RFR emissions at the site.

While the Commission recognizes the existence of, and adherence to, FCC licensing protocols regarding RFR emissions, the Commission, in looking at the cumulative impact of RFR emission levels at the site, and is presently concerned that a health hazard may exist in specific locations. In order to ascertain that public health, safety, and welfare are being served, more information needs to be collected, and made available to the Commission. The Commission may be required to impose appropriate conditions to assure safe, continued use of the site for recreational and communications purposes.

The Commission realizes that the bulk of the burden with regard to the management of RFR emissions falls upon the land owner, the State of Vermont, and the controlling lease holder, Vermont ETV, Inc. Under the original Land Use Permit, 7C0467, Condition #3, states:

> The District Environmental Commission maintains continuing jurisdiction during the lifetime of the permit and may periodically require certification that the project is being maintained in accordance with the terms of the permit.

The primary concern of the Commission is that, through a slow but steady increase in the number and type of communication towers, dishes, whip antennae, etc., key mountain top sites such as Burke could slip beyond the threshold of what is acceptable from both an aesthetic and safety standpoint under the relevant criteria. Particularly where mountain top use for communication purposes co-exists with recreational use, such as on Burke Mountain, the incremental growth in radiation generating communication equipment poses a unique threat. Another way to look at it is that such growth poses a unique planning challenge for the managers of such mountain tops. When we request a "master plan" for a mountain top, what we are primarily interested in is specific information regarding how, over the next 5 to 10 years, communications growth at the site will be managed so as not to create potential health and safety hazards to recreational users of the site and how plans will minimize negative aesthetic impacts, such that the use of the site remains in conformance with the relevant criteria.

The Commission, in light of the issue of RFR emissions, will thus seek to pursue continued conformance with Criteria 1, Air Pollution, by requiring the State of Vermont, Department of Forest, Parks, and Recreation, and Vermont ETV, Inc., to submit a Master Plan for the Facility. The co-applicants shall submit to the Commission, no later than July 31, 1995, a proposed approach and outline for addressing the following Master Plan components: the current level of compliance at the Facility with regards to the ANSI/EEE C95.1-1992 standards and the plans for development of a communications infrastructure at the Facility, with regard to RFR emissions conformance. A supplemental report to expand upon the findings produced in the Trott study of the Burke Mountain Facility may be required or another such comparable examination. The proposed approach and outline should include a time line with final Master Plan submissions to be made no later than July 31, 1996.

The Commission, through permit condition, retains the right to place further conditions upon Atlantic Cellular, Vermont ETV, Inc., and the State of Vermont, Department of Forest, Parks, and Recreation, under Criterion 1. The Commission may look to all of the contributors of RFR emissions at the Facility in determining appropriate remediation if unsafe RFR emission levels are determined to exist. Such conditions may seek to impose a financial responsibility and/or an emissions reduction to address air pollution generated by RFR emissions if such problems are identified, in the future. Cost share and emissions reductions could be determined on a pro-rated basis, by user RFR emissions output (similar to pro-rated emissions reductions required by the FCC at facilities found to be operating above the accepted standards).

SECTION 6086 (8) AESTHETICS, SCENIC BEAUTY, HISTORIC SITES AND NATURAL AREAS:

The Commission finds that the project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas.

1. The project will be located on two communications towers, one proposed and permitted 60 foot tower and one existing 75 foot tower, on the summit of Burke Mountain. Exhibit 6.

2. Burke Mountain has been designated a state-owned mountaintop communications site by the Vermont State Legislature (10 V.S.A. 2606a). Exhibit 10.

3. The Burke Mountain Communications Facility is currently a multi-use communications facility housing television, radio, and telecommunications transmitting and receiving equipment. Testimony.

4. The fabric which will cover the dish antennae can be painted a variety of colors to blend in with the existing surfaces and surroundings. Testimony.

5. The equipment to be installed is similar to the pre-existing equipment at the site. Exhibit 11.

6. There shall be no lighting of the telecommunications equipment located on the towers. Exhibit 11.

7. Burke Mountain possesses a paved toll road, terminating at a scenic parking area approximately 100 yards below the mountain summit, a ski area which utilizes the parking area and toll road, and a State maintained hiking trail which accesses the fire tower at the summit. Testimony.

8. The State of Vermont, Department of Forest, Parks, and Recreation Department is committed to the recreational use of the top of Burke Mountain and the surrounding 22,000 acres which are owned managed by the State of Vermont. Testimony.

Discussion:

The Commission finds the area surrounding the summit of Burke Mountain to be an active recreational site. The summit area is the ultimate destination for skiers, hikers, and other seasonal visitors. The area is seasonally accessible via the paved toll road which ascends the mountain to a scenic overlook near the ski lift terminus. A State owned and maintained hiking trail passes over the top of Burke Mountain, winding along the mountain top, and providing public access to the fire tower. The view from the tower allows visitors to take in a panoramic vista of distant areas. For the traveling public, at lower elevations, Burke Mountain can be seen to contain a mix of forest resources, commercial ski area development, and a communications facility.